

ORIGINAL

Supreme Court, U.S.
FILED

OCT 7 1993

93-5418

OFFICE OF THE CLERK

IN THE
COURT OF THE UNITED STATES

1993

Petitioner-Appellant

PAMELA

County of Indiana

**REPLY TO RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Counsel of Record

Donald E. Selvy
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9330

Of Counsel

Barry Lovestam
Douglas A. Graham
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9330

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. REED PROPERLY PRESERVED HIS IAD CLAIM FOR HABEAS REVIEW.	1
II. THIS COURT'S DECISION IN <u>BRECHT v. ABRAHAMSON</u> IS INAPPLICABLE TO REED'S CLAIM	2
III. THE ISSUE HERE IS ONE OF STATUTORY INTERPRETATION WHICH SHOULD BE RESOLVED BY THIS COURT	3
IV. RESPONDENTS CORRECTLY RECOGNIZE THAT THERE IS A LEGITIMATE DIFFERENCE OF OPINION ON THE SCOPE OF COLLATERAL REVIEW OF IAD VIOLATIONS	4
V. PETITIONER IS ENTITLED TO HABEAS RELIEF UNDER OTHER INTERPRETATIONS OF THE IAD	5
CONCLUSION	6

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Birdwell v. Skeen</u> , 983 F.2d 1332 (5th Cir. 1993) . . .	3
<u>Brecht v. Abrahamson</u> , 113 S. Ct. 1710 (1993)	2, 3
<u>Brown v. Allen</u> , 344 U.S. 443 (1953)	4
<u>Cody v. Morris</u> , 623 F.2d 101 (9th Cir. 1980)	3
<u>Fasano v. Hall</u> , 615 F.2d 555 (1st Cir.), <u>cert. denied</u> , 449 U.S. 867 (1980)	4
<u>Jenkins v. Anderson</u> , 447 U.S. 231 (1980)	2
<u>Wainwright v. Sykes</u> , 433 U.S. 72, 90 (1977)	1, 4
<u>Statutes</u>	
28 U.S.C. § 2254	3, 4
18 U.S.C. App.	5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORRIN SCOTT REED,

Petitioner-Appellant,

v.

ROBERT FARLEY, Superintendent,
Indiana State Prison and PAMELA
CARTER, Attorney General Of
Indiana,

Respondent-Appellees.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Brief in Opposition ("Opposition"), offers no sound basis for denying certiorari because each of the arguments raised by respondents lacks merit. Thus, this Court should grant the petition for certiorari to resolve the persistent split among the circuits on the scope of collateral review for violations of the Interstate Agreement on Detainers ("IAD").

I. REED PROPERLY PRESERVED HIS IAD CLAIM FOR HABEAS REVIEW.

As the Seventh Circuit held, respondents waived any procedural default claim that they may have had. (Pet. App. 5 (noting that respondent failed to invoke procedural default as required by Wainwright v. Sykes, 433 U.S. 72, 90 (1977).)

See also Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980)

("Considerations of judicial efficiency demand that a Sykes claim be presented before a case reaches this Court."). After the Seventh Circuit has reached the merits of this dispute, issued an opinion that is binding precedent on the federal district courts in three states, and created a circuit split worthy of this Court's attention, it is simply too late for respondents to assert procedural default claims to avoid this Court's review.^{1/}

II. THIS COURT'S DECISION IN BRECHT V. ABRAHAMSON IS INAPPLICABLE TO REED'S CLAIM.

Respondents are incorrect that the splintering of the circuits is a "dead letter" after Brecht v. Abrahamson,

^{1/} In any event, the pro se petitioner did not waive the IAD violation by failing to make his objections orally, as respondents assert. On June 27, 1983, the trial judge specifically requested that petitioner not make oral motions and instead put them in writing. (R. 390-91.) Petitioner made all subsequent IAD objections in writing rather than orally.

Nor did petitioner deliberately attempt to "ambush" the court with the IAD violation, as respondents assert. (Opposition at 3.) The judge was first made aware of the IAD's requirements on March 3, 1983. (R. 10.) On that date, the trial judge signed an order in which he agreed to try petitioner "within the time specified in Article IV(c)" of the IAD. Id. As respondent recognizes, petitioner repeatedly sought relief under various provisions of the IAD from that time until the 120-day period ended on August 25, 1983. (Opposition at 3.) Indeed, petitioner filed three motions -- on July 7, July 26, and July 29 -- that specifically addressed the 120-day trial requirement. (R. 77-78 (noting detention for 2½ months and violation of IAD); R. 90 (requesting "trial be held within legal guidelines of the Agreement on Detainers" to prevent trial "beyond the limits as set forth [in the] Agreement on Detainer Act"); R. 99, 103 (referring to IAD, noting that he had been in custody over 3 months, and stating that there was "limited time left for trial within the laws.")).

113 S. Ct. 1710 (1993). (Opposition at 7.) Brecht addresses only "trial errors" -- errors which occur "during the presentation of the case to the jury." Brecht, 113 S. Ct. at 1717 (quoting Arizona v. Fulminante, 111 S. Ct. 1246, 1249 (1991)). Indeed, respondents quote this Court's limitation of the Brecht holding to "habeas relief based on trial error." (Opposition at 8 (quoting Brecht, 113 S. Ct. at 1722).)

The Brecht rationale should not be extended to non-trial errors such as IAD violations. This Court in Brecht held that state courts were particularly well-suited to the difficult task of determining whether trial errors affected the outcome of trials. Id. at 1721. In contrast to trial errors, IAD violations do not benefit from deference to state courts. As prior federal decisions demonstrate, the existence of an IAD violation is simple for a federal court to ascertain and to resolve. See, e.g., Birdwell v. Skeen, 983 F.2d 1332, 1341 (5th Cir. 1993); Cody v. Morris, 623 F.2d 101, 103 (9th Cir. 1980). Thus, Brecht should not be applied in this case to thwart Supreme Court review.

III. THE ISSUE HERE IS ONE OF STATUTORY INTERPRETATION WHICH SHOULD BE RESOLVED BY THIS COURT.

Implicitly recognizing that petitioner is correct that interstate compacts such as the IAD cannot be changed by Congress alone, respondents argue that this Court should let Congress amend 28 U.S.C. § 2254, the habeas statute, to "clarify" whether IAD violations should be cognizable.

(Opposition at 11-12.) But there is no need to "clarify" the habeas statute, because that statute is perfectly clear as it is written: violations by state courts of federal "laws," such as the IAD, should be reviewed. 28 U.S.C. § 2254 (habeas covers "violation of . . . laws . . . of the United States"). As Justice Frankfurter observed, "[i]t is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress." Brown v. Allen, 344 U.S. 443, 500 (1953). This Court should not, as respondents suggest, require litigants to seek congressional action every time a lower court misinterprets a statute.

IV. RESPONDENTS CORRECTLY RECOGNIZE THAT THERE IS A LEGITIMATE DIFFERENCE OF OPINION ON THE SCOPE OF COLLATERAL REVIEW OF IAD VIOLATIONS.

Respondents set forth several reasons why they believe that the decision below is correct. They make no effort, however, to demonstrate that the decision below is consistent with the other circuits that have considered IAD violations on collateral review. In fact, prior to the decision below, no circuit had ever applied Stone v. Powell to IAD violations. Cf. Fasano v. Hall, 615 F.2d 555, 559 n.* (1st Cir.), cert. denied, 449 U.S. 867 (1980) (declining to apply Stone to IAD violations).^{2/} This case is worthy of

^{2/} Respondents are no more successful in their attempt to reconcile the conflicting approaches that existed prior to the Seventh Circuit's decision. In that attempt, they ignored both the Seventh Circuit's own recognition of the existing circuit split (Pet. App. 3) and the request by one Seventh Circuit judge for this Court to provide "firm guidance" on "a difficult problem upon which the circuits are in disarray." (Pet. App. 6.)

review by this Court based on the novel opinion below and the well-defined positions set out in the briefs.

V. PETITIONER IS ENTITLED TO HABEAS RELIEF UNDER OTHER INTERPRETATIONS OF THE IAD.

Respondents assert that petitioner would not be entitled to relief under any interpretation of the IAD because petitioner was not prejudiced by the violation. In so doing, respondents disregard the plain wording of the IAD, which does not require a showing of prejudice. Under the IAD, all courts of the United States -- not merely courts on direct review -- are directed to dismiss state court indictments, informations, or complaints when trial is not commenced within a 120-day period.^{3/} 18 U.S.C. App. §§ 2, 5, at 703-05. (Pet. App. at 29-31.) Moreover, respondents' argument merely highlights the harshness of the decision below, which denies relief irrespective of whether petitioner demonstrates that he was prejudiced.

In any event, as the petition explained, petitioner was prejudiced by the IAD violation. Absent the Indiana detainer, petitioner would have been in a federal community center while he was awaiting trial. (R. 53, 328, 339-40.) In that less restrictive confinement, he would have had greater access to law materials and potential witnesses. Instead, he was held in a county jail until shortly before

^{3/} The IAD does provide that the 120-day period can be extended "for good cause shown." Art. IV, 18 U.S.C. App. § 2, at 703 (Pet. App. 29.) The Indiana trial court did not find "good cause" here. (Pet. App. 1-2.)

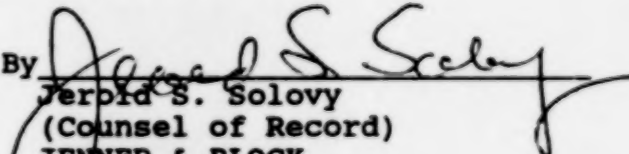
his trial commenced. As the Indiana trial court itself recognized, "the defendant [was] incapable of presenting the kind of defense which he . . . contemplated . . . because of his incarceration." (R. 83; see also R. 339 (Indiana state court acknowledges that "there is a world of difference between a prison and a half-way house.").) Thus, petitioner was prejudiced by the IAD detainer and violation.

CONCLUSION

For the reasons set forth above, as well as those set forth in the petition, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

ORRIN S. REED

By 
Jerold S. Solovy
(Counsel of Record)
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Barry Levenstam
Douglas A. Graham
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Dated: October 21, 1993